

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

GALIN E. FRYE

APPELLANT,

**v.
STATE OF MISSOURI**

RESPONDENT.

DOCKET NUMBER WD70504

DATE: January 29, 2013

Appeal From:

Boone County Circuit Court
The Honorable Clifford E. Hamilton, Jr., Judge

Appellate Judges:

Before Special Division: Thomas H. Newton, Presiding Judge, Joseph M. Ellis, Judge and
Cynthia L. Martin, Judge

Attorneys:

Emmett D. Queener, Columbia, MO, for appellant.

Shaun J. Mackelprang, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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This appeal follows the United States Supreme Court's vacation of our opinion in *Frye v. State*, 311 S.W.3d 350 (Mo. App. W.D. 2010) ("*Frye I*") and remand of the case to this court to determine state law questions bearing on the federal question of *Strickland*¹ prejudice where ineffective assistance of counsel is claimed in connection with plea negotiations. *Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399, 1410-11 (2012) ("*Frye II*"). In *Frye I*, we reversed a motion court's judgment rejecting a Rule 24.035 motion claiming ineffective assistance of counsel where trial counsel failed to communicate a plea offer. *Frye I*, 311 S.W.3d at 361.

REVERSED AND REMANDED

Special Division holds:

1. To demonstrate *Strickland* prejudice where ineffective assistance of counsel is claimed in connection with the communication of plea offers, a movant must show a reasonable probability that he would have accepted the un-communicated plea offer, and if the prosecution had the discretion to cancel the offer or if the trial court had the discretion to refuse to accept the offer, that there is a reasonable probability that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

2. Frye demonstrated a reasonable probability that he would have accepted the plea offer his trial counsel failed to communicate to him.

3. As a general rule, Missouri law permits the State discretion to withdraw a plea offer at any time prior to the offer's acceptance by the trial court, so long as the state does not deprive an accused of liberty or any other constitutionally protected interest.

4. Frye does not contest that the State could have withdrawn the plea offer his trial counsel never communicated to him.

¹*Strickland v. Washington*, 466 U.S. 668 (1984).

5. Missouri law permits a trial court virtually unlimited discretion prior to acceptance of a plea to refuse any plea of guilty outright or to reject any plea bargain between the State and the defendant, subject to the provisions of Rule 24.02(d).

6. Frye concedes that even had he accepted the plea offer never communicated to him by trial counsel, the trial court could have refused to accept the plea agreement.

7. Because both the State and the trial court had the discretion to withdraw or refuse to accept the plea offer that was never communicated to Frye, Frye has the burden to demonstrate a reasonable probability that neither would have exercised that discretion.

8. The motion court did not issue findings of fact or conclusions of law with respect to whether Frye demonstrated a reasonable probability that the State would not have withdrawn the un-communicated plea offer or that the trial court would have accepted a plea agreement based on the offer, issues that were not material to Frye's Rule 24.035 motion prior to *Frye II*. Notwithstanding, Rule 24.035(k) limits our appellate review to determining whether a motion court's findings or conclusions are clearly erroneous, requiring remand to permit the motion court to issue findings and conclusions on these undetermined matters.

Opinion by Cynthia L. Martin, Judge

January 29, 2013

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